Filed 1/28/10 P. v. Jackson CA1/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. FELIX LEE JACKSON, Defendant and Appellant.	A119620 (Alameda County Super. Ct. No. H37027)

Defendant Felix Lee Jackson, a 27-year-old probation officer with no criminal history, was charged with multiple felony counts, including assaulting a peace officer with a semiautomatic weapon and resisting an executive officer. The charges stemmed from an incident in which defendant inexplicably tackled a neighbor, and then engaged in a physical struggle with two police officers and three firefighters who had responded to the scene.

A jury convicted defendant of one count of assaulting a peace officer (Pen. Code,[1] § 245, subd. (d)(2)) and three counts of resisting an executive officer (§ 69), and found true the allegations that he personally used a firearm in committing these offenses (§§ 12022.53, subd. (b), 12022.5, subd. (a)). The trial court sentenced defendant to 17 years in state prison. On appeal, defendant contends: (1) the trial court abused its discretion in excluding evidence of his mental state at the time of the offenses; and (2) the

[1] All further undesignated statutory references are to the Penal Code.

evidence was insufficient to support the finding that the fire captain met the statutory requirements of an "executive officer" performing a duty. We affirm.

I. PROCEDURAL BACKGROUND

By an eight-count information filed on September 22, 2004, defendant was charged with assaulting a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2), counts 1, 2 & 3); resisting an executive officer (§ 69, counts 4, 5 & 6); and exhibiting a deadly weapon to a peace officer to resist arrest (§ 417.8, counts 7 & 8). As to each count, it was further alleged that defendant had personally used a firearm. (§§ 1203.06, subd. (a)(1), 12022.53, subd. (b), 12022.5, subds. (a) & (d).)

On July 22, 2005, defendant was the subject of a hold pursuant to section 5150 of the Welfare and Institutions Code. In November 2005, the trial court twice ordered defendant referred to a mental health clinic for evaluation (see §§ 4011, 4011.5, 4011.6) because his medication regimen "resulted in [a] marked inability to comprehend the nature of the court proc[ess] and [made it] unlikely that he can enter a knowing and intelligent waiver of his rights." Thereafter, the criminal proceedings were suspended on December 19, 2005.

The proceedings resumed on June 23, 2006, at which time defendant pled no contest to one count of assault on a peace officer (§ 245, subd. (d)(2)) and admitted one great bodily injury enhancement[2] (§ 12022.7, subd. (a)) in an exchange for the dismissal of the remaining counts.

On August 18, 2006, less than two months later, the trial court granted defendant's motion to withdraw his plea. The trial court then reinstated all of the charges against defendant. Defendant's 16-day jury trial began on June 13, 2007.

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[2] At the time of plea hearing, the prosecution orally amended the information to include the great bodily injury enhancement and defendant waived rearraignment.

II. EVIDENCE AT TRIAL

A. Prosecution Case

1. Weight Room Incident

Approximately 5:00 p.m. on July 19, 2004, Kirk McHenry went to the workout room of his apartment complex located in Hayward. When he entered, he noticed that the room was "really hot"; the air conditioning was off and the windows were closed. The temperature in the room felt close to 100 degrees. Defendant was sitting on one of the machines; his eyes were closed and he was breathing hard. McHenry noticed that defendant was "really sweaty" and his shirt was "drenched" in sweat. When McHenry asked him if he was okay, defendant did not respond. Defendant got up, stumbled, and fell onto all fours. McHenry again asked defendant if he was okay. Defendant did not respond, but started to adjust the weight system. As a result, McHenry assumed defendant was okay and was just having a hard workout.

As McHenry turned his back to plug in his radio, defendant suddenly "rushed" him and slammed him into a wall. When McHenry turned around, defendant started swinging his fists, hitting McHenry twice. McHenry then grabbed defendant by the shirt and forced him to the ground. Defendant hit the ground hard.[3]

McHenry noticed that defendant "just didn't look right," and that he had "a weird look in his eye." McHenry said, " 'Man, what's wrong with you? What's wrong with you?' " Defendant did not respond, but "just started swinging." McHenry defended himself, hitting defendant in the jaw. After hitting defendant, McHenry asked him if he was okay. Without any comment, defendant started throwing punches again. After McHenry hit defendant again, defendant stopped struggling and "just laid on the ground." Defendant's eyes were open, looking up with a blank stare.

McHenry went to the front office so that the apartment manager could call the police. After McHenry spoke with the 911 operator, he saw defendant walking away

[3] At the time, McHenry weighed 210 pounds; he estimated defendant's weight to be about 150 pounds.

from the apartment complex. Worried that defendant was going to jump on the nearby train tracks, McHenry followed defendant and called after him.

2. Emergency Personnel Arrive at the Scene

Approximately 5:30 p.m., Hayward Police Officers Mike Donofrio and Rodney Reed were dispatched to Whitman Green Apartments concerning a disturbance of the peace and a battery. Both officers were in uniform and each drove a marked patrol car. About the same time, Fire Captain Mark Bennett and Firefighter Earl Boles were also dispatched to a medical call at the Whitman Green Apartments concerning an "altercation." Although Bennett could not recall whether the call indicated an individual was unconscious, he remembered the call involved a possible head injury. Bennett and Boles arrived at the scene in a fire truck with its lights and sirens activated.

Donofrio and Reed saw the fire truck following defendant, who stared straight ahead and continued to walk down the street without ever acknowledging the fire truck's proximity to him. Boles said that defendant was initially staggering down the street.

Reed initially testified that defendant was identified as the unconscious person. He subsequently clarified that although defendant was identified as the person involved in the fight, he did not appear to be unconscious.

3. Defendant Struggles with Police Officers and Firefighters

Donofrio walked toward defendant; when he was about 10 feet from defendant, Donofrio asked to speak with him. After defendant did not respond, Donofrio said, "Hayward Police. I need to talk to you." Defendant walked past Donofrio with clenched fists, looking straight ahead with a tense look on his face. Defendant never looked at Donofrio, and never acknowledged the fire truck that was following him.

Donofrio then grabbed defendant's wrists, spinning him around so that defendant and Donofrio were facing each other. Defendant bent down as if he was going to lunge at Donofrio. Defendant then "rushed" into Donofrio "like making a tackle." According to Bennett, defendant lunged at Donofrio's firearm. Donofrio responded by placing defendant in a bear hug.

According to Reed, defendant and Donofrio fell to the ground when defendant lunged at Donofrio. Reed then "jumped on the pile," along with the firefighters. Donofrio, however, recalled falling to the ground after Bennett and Boles came up behind him as he had defendant in the bear hug. Bennett remembered that he "bull rushed" defendant and Donofrio, taking "them both down to the ground."

While still in the bear hug, Donofrio fell on top of defendant as both men hit the street; defendant was on the bottom. Bennett put defendant in a head lock. Reed told defendant several times, " '[S]top resisting. Stop. Stop. Stop. Put your hands back.' " At this time, Reed pulled out his baton and started striking defendant's shins. Appellant struggled violently, kicking his legs, but still saying nothing.

During the struggle, Donofrio felt a "tug" on his right side. Donofrio reached down to check for his gun and discovered that it was no longer in the holster. Donofrio called out that defendant had his gun. He then felt an object brushing against his body and then saw the barrel of his gun pointed at his face. Donofrio put his right hand over the barrel of the gun, trying to move it away from his face. He put his left hand in defendant's face, attempting to obscure his view.

Bennett attempted to gain control of the gun. He also tried to remove the gun's magazine. The "gun moved throughout the struggle," and at one point, the gun was pointed at Bennett. Ultimately, Boles pulled defendant's fingers off of the gun, and he gave it to Reed.

4. Defendant's Demeanor During and After the Struggle

During the struggle, defendant "wasn't acting appropriately, [and] it appeared he may have been in an altered state . . . either as a result of narcotics or intoxication . . . ." Although Donofrio stated that he thought defendant exhibited signs of being under the influence of PCP, the prosecutor stipulated that defendant had no PCP in his system. Bennett thought "[t]here was something definitely wrong with [defendant]." Boles also mentioned that defendant was "acting different." At some point during the struggle, defendant urinated and defecated on himself. After the struggle, defendant remained on his back; he had his eyes closed and he was nonresponsive.

To determine whether defendant was unconscious, Boles performed an "arm drop" test on defendant. Boles initially recalled that defendant voluntarily moved his arm to avoid hitting his face. Boles, however, could not remember if defendant was handcuffed at the time of the test, but explained that if he had been handcuffed, Boles would have dropped both of defendant's arms. Boles explained that he could not recall whether he administered the test on defendant, but his notes indicated that he had done so.

Defendant was taken by ambulance to Eden Hospital. During the ride to the hospital, defendant did not open his eyes and did not answer any questions. At the hospital, defendant opened his eyes and became "[c]ombative, uncooperative, [and] aggressive." The medical staff sedated him.

5. Search of Defendant's Home

A search of defendant's home produced the following evidence: (1) a .45-caliber semiautomatic pistol; (2) three magazines; (3) 41 rounds of ammunition; (4) defendant's Fresno County reserve deputy sheriff badge; and (5) defendant's Alameda County Probation Department employee tag. The parties stipulated that defendant previously had been a deputy sheriff.

B. Defense Case

1. Defendant's Testimony

Defendant testified on his own behalf. At the time of trial, he was taking various "psyche [*sic*] medication[s]," including Remeron and Risperidone. He was raised by his grandmother and had limited contact with his mother. Defendant attended Fresno State from 1996 to 2001, where he majored in criminology. During college, he enrolled in an internship program with the Fresno County Sheriff's Department. After graduation, he became a Fresno County deputy sheriff; he worked in the field and in court. Following a knee injury, defendant went to work for the Fresno County Probation Department. He then went to work for the Alameda County Probation Department.

Defendant testified that he could not recall most of what happened in the workout room on July 19, 2004. He remembered one person attacking him, and then defendant blacked out. When he came to, he left the workout room and started to walk down the

street. He remembered walking past one police officer, and then being surrounded by a group of police officers and paramedics. Defendant recalled that one police officer took a step back and hit him. Defendant tried to defend himself, and then he blacked out again.

Defendant next remembered lying face down on the ground, possibly with his hand on a gun. His eyes were closed and he heard someone say, " 'He's got my gun.' " His next memory was of being handcuffed and loaded into an ambulance. Defendant said that he lost consciousness four or five times that day. Defendant testified that since the incident, he has had difficulty with his memory.

In May 2005, defendant spoke with John Shields, Ph.D. Defendant did not recall telling Dr. Shields that he lost consciousness only once on the day of the incident. He remembered telling Dr. Shields that an officer walked past him and that the officer attacked him; he also remembered telling Dr. Shields that he heard someone say, " 'He has a gun.' " Defendant also recalled telling Dr. Shields that he "began to realize that they were cops, so [he] stopped resisting, and . . . they handcuffed [him]," and they put him in an ambulance.

2. Psychological Evidence

Steven Cloutier, Ph.D., a licensed clinical psychologist and expert in psychology, reviewed Dr. Shields's report and defendant's medical records from the jail and hospital. Just prior to giving his expert testimony, Dr. Cloutier interviewed defendant for approximately 90 minutes. During this interview, defendant told Dr. Cloutier that he "ha[d] very little memory . . . and very little understanding" of the incident with McHenry and the subsequent confrontation with the police.

Following his arrest, defendant was "almost immediately" placed on medication, including Ativan, a tranquilizer, as well as Haldol and Zyprexa, which are antipsychotic medications. Dr. Cloutier opined that defendant had been suffering from "an ongoing mental disorder of some sort" since the July 19, 2004 incident, which included a suicide attempt and nonresponsive/catatonic behavior. Based on his interview with defendant and his review of the information he had been provided about defendant, Dr. Cloutier

thought defendant's behavior on July 19, 2004, was "very out of character." Defendant told Dr. Cloutier that he had not been in a fight since high school, and "he was unable to explain . . . how or why he would have been involved in a fight other than he was scared."

Defendant told Dr. Cloutier that when the police approached him, he was not certain they were police officers; he knew only there was a bunch of people hitting him and knocking him down. Dr. Cloutier was unaware that defendant had testified earlier that week that he knew the men were police officers. Dr. Cloutier explained that the focus of his assessment of defendant was to determine whether his behavior was consistent with suffering blows to the head during an altercation. He assumed that defendant was knocked unconscious in the workout room; he was not told that McHenry reported defendant was wiping his face and making noises.

Dr. Cloutier defined "unconsciousness" as someone being "knocked out cold," and "impaired awareness" as a state in which someone is not aware of what he or she is doing. Dr. Cloutier believed that defendant had an "impaired awareness of his surroundings" during the incidents on July 19, 2004. He opined that defendant was "intending to defend himself, and he formed that intent based on a misperception and a mis-awareness [*sic*] of events. And due to his mental state, he did not accurately understand what was going on around him and was not aware that he was not accurately understanding."

3. Character Witnesses

Tamara Johnson worked with defendant as an Alameda County probation officer, and she considered him a good friend. She described defendant as outgoing, hard working and funny. On July 19, 2004, approximately 3:00 p.m., Johnson spoke with defendant. During this conversation, Johnson observed that defendant was speaking slowly, slurring his words, and was "[n]ot his normal self." He also seemed tired, but was otherwise coherent.

Toni Eastman, defendant's aunt, helped to raise defendant. She described defendant as being an "[a]verage kid," who never got into trouble. Eastman was

"shocked" by the charges against defendant because such aggressive behavior was contrary to his "easygoing demeanor."

Maxine Jackson, defendant's grandmother, raised defendant since he was a baby. She described defendant as "pretty easygoing"; he was not an aggressive person.

III. DISCUSSION

A. Failure to Admit Mental Health Evidence

The central issue on appeal is whether evidence of defendant's alleged psychotic break, or mental health status, was relevant to the issue of guilt. Since 1981, the rule in California has been that "[e]vidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent . . . when a specific intent crime is charged." (§ 28, subd. (a).)

1. Background

Defendant moved in limine for admission of mental state evidence to negate the requisite mens rea of counts 1, 2 and 3 (assault), and counts 7 and 8 (exhibiting weapon to resist arrest). The trial court denied the motion regarding counts 1, 2 and 3, on the ground that they were general intent crimes. As to counts 7 and 8, the trial court allowed a limited introduction of mental state evidence.

At the next hearing, the prosecution announced its decision to dismiss counts 7 and 8. In response, defense counsel renewed his request to introduce mental state evidence as to all remaining counts. Defense counsel argued that "both of those charges [assault and resisting executive officer] seemed to utilize a language that seemed to indicate a specific mental state" that is "akin" to a "specific intent." Rejecting this argument, the trial court ruled that "Counts 1 through 6[] are all general intent crimes, and mental state evidence would not be relevant on that issue."

During the trial, defense counsel renewed the motion to admit evidence of defendant's mental illness on four occasions, which the trial court denied. First, the trial court denied defense counsel's request to introduce Dr. Shields's report, which concluded that although defendant was not psychotic, his "description of the events just prior to and during the instant offense [were] congruent with the mental status changes that would be expected in one who [w]as assaulted and who took blows to the head which resulted in loss of consciousness. . . . [¶] . . . His description of events suggest that the combination of post-traumatic, and post-loss-of-consciousness, mental status impairment was present at the time of the instant offense." Defense counsel argued that, in light of the prosecutor's reference to Dr. Shields's report during cross-examination of defendant, it was proper to admit the entire report.

The second instance involved the trial court's refusal to allow defendant to answer a juror's written question following his testimony,[4] which asked: " 'Has a doctor ever given you a diagnosis of a mental illness? If so, what mental illness?' " In the third instance, the trial court excluded Dr. Cloutier's proffered testimony that defendant's struggle with the officers was the result of "a dual combination, his altered mental state coupled with his unconsciousness." The fourth occasion involved the trial court's refusal to allow Dr. Cloutier to answer three follow-up questions posed by the jury, to wit: (1) " 'Do you believe [defendant] may be unsure of his responses because of his current mental state?' "; (2) " 'Is [defendant's] current condition the result of a brain injury?' "; and (3) " 'Are people put on antipsychotic [drugs] and/or tranquilizers because they are dangerous to themselves and/or others? In cases like the defendant, shouldn't these people have been on these drugs before an incident takes place?' "

On appeal, defendant argues that his "full defense was that his psychotic state, coupled with a head injury, rendered him legally unconscious." (Capitalization omitted.) He insists the trial court violated his due process rights by preventing the jury from

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[4] At the commencement of trial, the trial court invited the jurors to submit written questions to the court after each testifying witness.

considering a "key evidentiary factor in explaining [his] heightened aggression, impaired awareness, and lack of knowledge regarding his conduct."

2. Analysis

While acknowledging that he was charged with general intent crimes, defendant insists that evidence of his mental illness was relevant with regard to the *knowledge* requirement that he knew he was assaulting a peace officer (§ 245, count 2) and that he knew he was resisting an executive officer (§ 69, counts 4, 5 & 6).[5] Generally, we review a trial court's rulings on relevance and the admission or exclusion of evidence for abuse of discretion. (*People v. Harrison* (2005) 35 Cal.4th 208, 230.)

In resolving the issues on appeal, it is necessary to discuss the distinction between general and specific intent crimes, and the effect of this distinction regarding the concept of knowledge.

a. General and Specific Intent Crimes

"When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent." (*People v. Hood* (1969) 1 Cal.3d 444, 456-457; see also *People v. Sargent* (1999) 19 Cal.4th 1206, 1215 [general intent crime is one where no further mental state beyond willing commission of act proscribed is required].) It is sufficient in general intent crimes that the defendant intentionally completes the act declared to be a crime. (*People v. Cole* (2007) 156 Cal.App.4th 452, 477.)

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[5] The central theme of defendant's appellate briefs was his claim that the excluded evidence was highly relevant to whether he had *knowledge* of the charged acts. However at oral argument, defendant's appellate counsel inexplicably withdrew this argument, asserting that the excluded evidence was relevant only to defendant's unconsciousness defense. Even overlooking the impropriety of recasting the appellate issues at oral argument, the analysis of whether the excluded evidence was relevant to the unconsciousness defense cannot be divorced from the analysis of the charged offenses and requisite mental states.

"The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender. That problem is to reconcile two competing theories of what is just in the treatment of those who commit crimes while intoxicated. On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences. [Citation.] [¶] Before the nineteenth century, the common law refused to give any effect to the fact that an accused committed a crime while intoxicated. The judges were apparently troubled by this rigid traditional rule, however, for there were a number of attempts during the early part of the nineteenth century to arrive at a more humane, yet workable, doctrine. . . . [Citation.] To limit the operation of the doctrine and achieve a compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender, later courts both in England and this country drew a distinction between so-called specific intent and general intent crimes." (*People v. Hood, supra,* 1 Cal.3d at pp. 455-456, fn. omitted.)

"Evidence of voluntary intoxication may be introduced to show the absence of specific intent but not to show the absence of general intent. (See []§ 22.) Because specific intent crimes are usually more serious than general intent crimes and because there is usually, though not invariably, a general intent crime available as an alternative to each specific intent crime [citation], the system normally works to mitigate the culpability of the voluntarily intoxicated defendant without permitting complete exoneration. A defendant charged only with a general intent crime derives no benefit from the rule but intoxication may still be considered as a mitigating factor for sentencing purposes. [Citation.] [¶] Thus the distinction between general intent and specific intent crimes is at bottom founded upon a policy decision regarding the availability of certain defenses. This is illustrated by the rule that voluntary intoxication is not a defense to a general intent crime even though the intoxication results in unconsciousness. [Citation.]" (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1081.) "Mental illness poses a policy dilemma similar in many respects to that of voluntary intoxication. [Citation.] A

defendant who pleads and proves insanity is totally absolved of criminal responsibility although subject to civil confinement. If the defendant chooses not to enter an insanity plea, or if the evidence is not sufficient to establish insanity, then sympathy toward the mentally ill defendant must be balanced against the considerations that such a person, being either legally sane or having voluntarily relinquished an insanity defense, may not be entirely blameless and may present a continuing public danger. Accordingly, the rule has developed that evidence of mental illness may be offered to show the absence of specific intent but not to prove the absence of general intent. [Citations.]" (*People v. Gutierrez, supra*, 180 Cal.App.3d at p. 1082.)

Although the California Supreme Court has determined the classification of an offense as either one of specific or general intent is not always meaningful in instructing a jury on the state of mind required for that offense, it has reiterated that such classification is necessary " 'when the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available; whether evidence thereon is admissible; or whether appropriate jury instructions are thereby required. [Citation.]' [Citation.]" (*People v. Rathert* (2000) 24 Cal.4th 200, 205.) Additionally, our Supreme Court, in revisiting its earlier rulings holding assault is a general intent crime, has determined that even though there is a knowledge requirement a defendant "be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct" (*People v. Williams* (2001) 26 Cal.4th 779, 788), "[a]ssault is still a general intent crime [citations], and juries should not 'consider evidence of defendant's intoxication in determining whether he committed assault' [citation]." (*Ibid.*)

b. "Knowledge"

The opinion in *People v. Lopez* (1986) 188 Cal.App.3d 592, although addressing section 148 (resisting, delaying, or obstructing officer), is useful in distinguishing between knowledge and specific intent. There, the defendant was charged with resisting arrest by running from a police officer, and the appellate court held that the trial court erred by failing to instruct that the defendant must know he or she is running from a

police officer. The court acknowledged that resisting arrest is a general intent crime but explained that general intent and knowledge are distinct concepts since "[k]nowledge does not refer to the defendant's awareness that what he or she does is culpable or criminal in nature." (*Id.* at p. 598.) The court explained that, while general intent crimes proscribe particular acts with no reference to the actor's intent to achieve further acts or future consequences as to the restricted action, "[t]here must be, however, awareness by the actor that the illegal act is being done within the terms of the statute. This is knowledge, not specific intent." (*Ibid.*) The court concluded that "[b]efore one can be found culpable [of resisting arrest], . . . he or she must know, or through the exercise of reasonable care should have known, that the person attempting to make the arrest is an officer." (*Id.* at p. 599.)

Less helpful are the decisions cited by defendant, which involved offenses including an element of *actual* knowledge. For example, in *People v. Mendoza* (1998) 18 Cal.4th 1114, our Supreme Court held that a charge of aiding and abetting included an element of "specific intent" for purposes of admitting evidence of voluntary intoxication, because it required that an aider and abettor have actual knowledge of the perpetrator's criminal purpose, combined with an intent to encourage or facilitate that purpose (*id.* at pp. 1122-1123, 1126-1127, 1131). Similarly, in *People v. Reyes* (1997) 52 Cal.App.4th 975, an appellate court held that the offense of receiving stolen property included an element of "specific intent" for purposes of admitting evidence of a mental disorder pursuant to section 28, because the charge required the perpetrator to have actual knowledge that the property received was stolen (*id.* at pp. 984-986).

Although not cited by the parties, we find *People v. Jefferson* (2004) 119 Cal.App.4th 508 (*Jefferson*) to be instructive in distinguishing the requisite mental states at issue in *People v. Mendoza, supra,* 18 Cal.4th 1114 and *People v. Reyes, supra,* 52 Cal.App.4th 975, and the mental state that is required to prove assault on a peace officer under section 245, subdivision (d)(2). In *Jefferson*, the defendant was convicted of several counts of battery against correctional officers, which he committed while incarcerated in the psychiatric unit of a state prison. (*Jefferson, supra,* 119 Cal.App.4th

at pp. 510-512.) On appeal he claimed the trial court had erred in excluding evidence of his mental illness to establish the affirmative defense of self-defense. (*Id.* at pp. 516, 518-519.) Before trial, the prosecution moved to exclude such evidence on the ground that it was not relevant. (*Id.* at p. 516.) The trial court, in granting the motion, had rejected the defendant's argument that evidence of his mental disorder was relevant to establish that a reasonable belief, under the circumstances, was the belief of an individual with a mental illness, who found himself in a "mental health prison ward being treated for [that] illness." (*Id.* at pp. 516-517.) When the defendant reiterated this argument on appeal, the appellate court likewise rejected it. (*Id.* at pp. 518-519.) In so ruling, the reviewing court noted that the issue was "whether a 'reasonable person' in defendant's situation . . . would be justified in believing he was in imminent danger of bodily harm." (*Id.* at p. 519.) The court held that such a "reasonable person" was not properly defined as "one who hears voices due to severe mental illness," but rather as "an abstract individual of ordinary mental and physical capacity . . . ." (*Ibid.*) The court thus affirmed that the proper standard to be employed by the jury in determining whether the defendant's belief was "reasonable," for purposes of acting in self-defense, was an objective rather than subjective standard. (*Id.* at p. 520.)

People v. Mendoza, supra, 18 Cal.4th 1114 and *People v. Reyes*, *supra*, 52 Cal.App.4th 975, stand for the proposition that in certain circumstances a mental state of actual, subjective knowledge can be equivalent to "specific intent." Only when actual, subjective knowledge is required can a defendant's mental disorder or voluntary intoxication have possible relevance to negate the requisite mental state. Here, by contrast, section 245, subdivision (d)(2) requires that a defendant "know[] or reasonably should know" his or her victim is a peace officer. The offense of assault on a peace officer does not require actual, subjective knowledge, because the requisite knowledge may ultimately be imputed under the same, objective "reasonable person" standard as that applied in *Jefferson, supra,* 119 Cal.App.4th 508, to determine whether a defendant's belief in the need for self-defense measures was "reasonable." In short, we conclude that

section 245, subdivision (d)(2) does not include a requisite mental state that is the equivalent of "specific intent" for purposes of admissibility of mental illness evidence.

We reach the same conclusion with respect to the offense of resisting an executive officer.[6] Section 69 renders criminally culpable every person "who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed . . . by law, *or* who knowingly resists, by the use of force or violence, [an executive] officer, in the performance of his duty . . . ." (Italics added.) As demonstrated by the italicized language, section 69 "sets forth two separate ways in which an offense can be committed. The first is attempting by threats or violence to deter or prevent an officer from performing a duty imposed by law; the second is resisting by force or violence an officer in the performance of his or her duty. [Citation.]" (*In re Manuel G.* (1997) 16 Cal.4th 805, 814.)

Here, defendant was charged with and convicted of the second way of violating section 69, the resistance prong, which involves a defendant who "knowingly" resists an executive officer. "The word 'knowingly' imports only a knowledge that the facts exist which bring the act or omission within the provisions of this code. It does not require any knowledge of the unlawfulness of such act or omission." (§ 7, subd. 5.) "The use of the words knowingly and willfully in a penal statute usually define a general criminal intent. [Citation.] There can be specific intent crimes using the terms but the specific intent in those instances arises not from the words willfully or knowingly, but rather from the requirement in those offenses there be an intent to do a further act or achieve a future consequence. [Citations.]" (*People v. Bell* (1996) 45 Cal.App.4th 1030, 1043.)

The definition of the resistance offense of section 69 consists only of a description of the act of resisting an executive officer, without reference to an intent to do a further act or achieve a further consequence. (See § 69; *People v. Hood, supra,* 1 Cal.3d at pp. 456-457.) Accordingly, the resistance offense would appear to be a general intent

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[6] Although arguing in appellate briefing that defendant had waived this claim, at oral argument the Attorney General conceded the issue had not been waived.

crime (see, e.g., *People v. Roberts* (1982) 131 Cal.App.3d Supp. 1, 8-9 (*Roberts*)), which would render the evidence of defendant's mental illness irrelevant.

That said, we note that several cases dealing with violations of section 69 have held or assumed that section 69 is a specific intent crime at least with respect to the offense described in the first clause of section (attempt to deter/prevent). (See *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154 (*Gutierrez*); *People v. Hines* (1997) 15 Cal.4th 997, 1061-1062; *In re M. L. B.* (1980) 110 Cal.App.3d 501, 503; *People v. Patino* (1979) 95 Cal.App.3d 11, 27-28 (*Patino*); *Roberts, supra,* 131 Cal.App.3d Supp. at pp. 8-9.) However, these cases do not differentiate between the two distinct offenses set forth in section 69.

For example, *Patino* made no distinction between the two clauses of section 69, when stating that obstruction or resisting "would appear to require an act done with the specific intent to interfere with the officer's performance of his duties." (*Patino, supra,* 95 Cal.App.3d at p. 27.) In *Gutierrez, supra*, 28 Cal.4th 1083, the California Supreme Court cited *Patino* without disapproving this language (*Gutierrez, supra,* at pp. 1153-1154). However, unlike the instant case, the actions of the defendants in both *Patino* and *Gutierrez* were within the purview of the first clause of section 69. (See *Gutierrez, supra,* at pp. 1153-1154; *Patino, supra*, at pp. 27-28.) Moreover, no case has affirmatively stated that the second clause of section 69 describes an offense requiring specific intent. (See, e.g., *Gutierrez, supra,* at pp. 1153-1154; *Patino, supra,* at pp. 27-28.)

Indeed, *Roberts* is the only case to actually state that, although the first portion of section 69 describes a specific intent crime, the second portion describes a general intent crime. (*Roberts, supra,* 131 Cal.App.3d Supp. at p. 9.) However, the defendant in *Roberts* was charged with resisting arrest in violation of section 148 and the court reached its conclusion regarding section 69 in order to decide whether section 148 is a general or specific crime. (*Ibid.*) Therefore, the conclusion in *Roberts* regarding section 69 is merely a comment made in passing, not the holding of the case. We note, however, that the recently adopted CALCRIM instructions, like the *Roberts* court, differentiate

between the distinct offenses set forth in section 69. (See CALCRIM No. 2651 [preventing or deterring executive officer from performance of duty requires specific intent]; CALCRIM No. 2652 [resisting executive officer in performance of duty is general intent offense].)

In sum, we conclude that neither the offense of assaulting a peace officer (§ 245, subd. (d)(2)) nor the offense of resisting an executive officer as set forth in the second clause of section 69 includes a requisite mental state that is akin to "specific intent" for purposes of admissibility of mental illness evidence.

c. Any Error Was Harmless

Any error in excluding the proffered mental illness evidence resulted in no prejudice to defendant. Generally, " '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.]" (*People v. Fudge* (1994) 7 Cal.4th 1075, 1103.) Thus, in this scenario "the proper standard of review is that announced in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . , and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24 . . .)." (*People v. Fudge, supra,* 7 Cal.4th at p. 1103.)

Defendant contends that the claimed errors violated his state and federal due process rights to present a defense, and must therefore be reviewed under the standard set forth in *Chapman v. California, supra,* 386 U.S. 18. According to defendant, the trial court's error prevented him from presenting his full defense, which was that his emergent psychosis, combined with the head injury, caused his bizarre behavior on the day of the incident. Defendant claims that the trial court prejudicially erred in failing to admit Dr. Shields's report, limiting Dr. Cloutier's testimony, and by refusing to allow Dr. Cloutier

and defendant to respond to the jury's follow-up questions. Defendant insists that the proffered evidence of his "psychosis and corroborated head injury . . . was highly relevant to establishing that [he] lacked the requisite knowledge to be criminally liable for the charged counts." We disagree.

First, as discussed, "knowledge" is not the equivalent of specific intent for purposes of admissibility of mental illness evidence with respect to the charged offenses. Second, even assuming arguendo that defendant's knowledge was relevant, experts may not testify as to whether a defendant acted with or without a particular mental state. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 408.) Indeed, section 29 precludes such expert opinion: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, *knowledge*, or malice aforethought, for the crimes charged. *The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.*" (Italics added.)

In the instant case, the trial court did not refuse to allow defendant to present a defense, but only rejected some evidence concerning the defense. (See *People v. Fudge, supra,* 7 Cal.4th at pp. 1102-1103.) Indeed, defendant presented extensive evidence on the issue of unconsciousness. Moreover, the exclusion of Dr. Shields's report did not hinder defendant's defense. First, we note that Dr. Shields concluded that defendant did not have a mental disorder. Rather, he opined that defendant "continues to be alert, oriented, and evidently well in command of his mental faculties, as he was when interviewed previously." Moreover, Dr. Cloutier testified that even though Dr. Shields determined defendant did not suffer from a mental defect, Dr. Shields stated that defendant's behavior on July 19, 2004, "was consistent with post-head-injury, mental-state changes."

Similarly, the exclusion of testimony by Dr. Cloutier and/or defendant regarding defendant's *current* mental illness diagnosis was unrelated to the incident that occurred three years earlier, and thus did not prejudice defendant. Finally, substantial evidence

supported the jury's finding defendant knew or should have known that he was struggling with police officers. Indeed, defendant admitted that he remembered "walking past one officer," and that he knew it was a police officer because he "may have [seen] a badge," and he "could have had a uniform on." He also remembered an officer and paramedics standing around him.

Finally, the jury heard testimony about defendant's normal, easygoing demeanor, and that on the day in question, he seemed tired and slurred his words. This testimony, along with Dr. Cloutier's opinion that defendant's behavior was consistent with defendant having suffered an altered mental state based on a perceived loss of consciousness, supported defendant's theory that he was not legally conscious of his conduct on the day in question.

In light of the nature of the evidence excluded and the evidence admitted, there is no possibility the trial court's evidentiary ruling prejudiced defendant, whether harmless error is judged under the state standard for erroneous evidentiary rulings, which we believe applicable here (*People v. Fudge, supra*, 7 Cal.4th at pp. 1102-1103), or the elevated standard that would be required if the ruling had completely prevented appellant from presenting a defense (*id.* at p. 1103).

B. Fire Captain as "Executive Officer"

Defendant contends that Bennett, as a fire captain, was not an "executive officer" within the meaning of section 69 because the statute fails to list the term " 'firefighter' as a protected category . . . ." According to defendant, this omission is "significant," in that the Legislature has expressly included firefighters in other instances. Defendant asserts that "[i]f the . . . [L]egislature [had] intended to extend the reach of section 69 to firefighters, it could easily have added the word 'firefighter' to section 69 as it did to section 245, subdivision (d)," which expressly criminalizes any assault "upon the person of a peace officer or firefighter."

If we were to accept defendant's interpretation, we would be effectively writing the term "executive officer" out of the statute. (See *In re Manuel G., supra,* 16 Cal.4th at p. 819.) Contrary to defendant's argument, section 69 lists no "protected category" of

persons who are within the ambit of its statutory protection. Rather, section 69 criminalizes obstructing or resisting an "executive officer" in the performance of his or her duty. Although section 69 does not define "executive officer," this term has long been interpreted as including police officers at all governmental levels as a matter of law. (See *In re Manuel G., supra,* 16 Cal.4th at pp. 818-819; *People v. Markham* (1883) 64 Cal. 157, 158-159 [interpreting section 68]; *People v. Mathews* (1954) 124 Cal.App.2d 67, 68-70 [interpreting section 67]; *People v. Kerns* (1935) 9 Cal.App.2d 72, 73-75 [interpreting section 68].)

Following defendant's interpretation, however, section 69 would not extend to police officers since they are not expressly listed by name in that statute. Such an interpretation would be contrary to the apparent purpose of that section, which "is designed to protect a police officer (who is an executive officer) against violent interference with the performance of his duties . . . ." (*People v. Buice* (1964) 230 Cal.App.2d 324, 336.)

Defendant nevertheless insists that since firefighters are not trained or authorized to enforce the law, they are not included in section 69. In support of this assertion, defendant relies on CALJIC No. 7.50 for the proposition that an "executive officer" is an individual who has "the responsibility of enforcing the law." Defendant's argument notwithstanding neither section 69 nor CALJIC No. 7.50 is limited to law enforcement officers. The version of CALJIC No. 7.50 given to the jury in the instant case provides, in part, as follows: "An 'executive officer' is a public employee whose lawful activities are in the exercise of a part of the sovereign power of the governmental entity employer, and whose duties are discretionary, in whole or in part. Any employee charged with the responsibility of enforcing the law is an executive officer."

Moreover, the term "executive officer," has been interpreted to include numerous public employees who are not otherwise engaged in law enforcement. As the California Supreme Court has observed: "Indeed, the term 'executive officer' as used in section 69 . . . extends to other executive officers who would have no occasion to engage in the execution of court process or similar duties . . . . (E.g., *People v. Superior Court*

(Anderson) [(1984)] 151 Cal.App.3d 893, 895 [threat to kill mayor is sufficient to support charge of violating section 69]; see also *People v. Kerns*[*, supra,*] 9 Cal.App.2d [at pp.] 73-75 . . . [junior epidemiologist-bacteriologist employed by State Board of Public Health to perform inspections of aviaries is 'executive officer' within the meaning of section 68, prohibiting bribery of such officers]; Gov. Code, § 1001 [defining 'civil executive officers' to include numerous public employees not engaged in law enforcement].)" (*In re Manuel G., supra*, 16 Cal.4th at pp. 818-819.)

In the instant case, defendant argues that Bennett made a "personal decision to become involved in a physical struggle," which "was outside . . . the scope of any duty he had as a firefighter." We disagree. A firefighter's duties are not as limited as defendant suggests. Indeed, "[m]embers of an organized fire department have the powers of peace officers while engaged in the performance of their duties with respect to the prevention and suppression of fires and the protection and preservation of life and property against the hazards of fire and conflagration. [Citation.]" (*Romero v. Superior Court* (1968) 266 Cal.App.2d 714, 721-722.) Moreover, it is well established that firefighters, in the course of responding to an emergency, may seize contraband that is in plain view. (See, e.g., *Michigan v. Tyler* (1978) 436 U.S. 499, 509 [once in building to extinguishing blaze, firefighters may seize arson evidence in plain view]; *People v. Ramsey* (1969) 272 Cal.App.2d 302, 311 [warrantless entry by firefighters responding to apparent emergency justified]; *Romero v. Superior Court*, *supra*, 266 Cal.App.2d at pp. 717-722 [firefighters at scene of residential explosion entitled to seize contraband in plain view]; see also *People v. Roberts* (1956) 47 Cal.2d 374, 377, 379 [conducting reasonable search police officers "did not did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered"].) Thus, while Bennett was responding to a medical emergency, much like a firefighter extinguishing a blaze or determining the cause of an explosion, he was under no obligation to blind himself to criminal behavior taking place. In other words, even if joining in the physical struggle was disconnected with the original dispatch, Bennett was justified in rendering

assistance to the police officers who were involved in a physical struggle with the possible subject of the medical emergency.

The focus of the prohibition against resisting an executive officer is not to protect the offender from the consequences of his or her own conduct, but to protect the executive officer from interference with the performance of his or her duties. (See *People v. Pacheco*, *supra*, 263 Cal.App.2d at p. 558; *People v. Buice*, *supra*, 230 Cal.App.2d at p. 336.) We conclude there was substantial evidence that Bennett was an executive officer performing a duty and that defendant forcefully interfered with such performance.

IV. DISPOSITION

The judgment is affirmed.

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Reardon, J.

We concur:

_____
Ruvolo, P.J.

_____
Sepulveda, J.